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In The
Supreme Court Of The United States

OCTOBER TERM, 1990

NORTHWEST SAVINGS BANK, PaSA, CADRE CAPITAL, FINANCIAL CENTRE SECURITIES, NORMAN BALLARD, EDNA LOU BALLARD and JOHN ROBERTS,
Petitioners,

v.

WILLIAM WELCH III, ANDREW GUEST and ELIZABETH GUEST,
Respondents.

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

BRIEF IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI

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I. STATEMENT OF THE CASE

Because Petitioners' statement of facts puts a gloss on the issue of fraudulent concealment, Respondents call the Court's attention to certain factual allegations

in Plaintiffs' Complaint. When it reversed the decision of the trial court, the United States Court of Appeals for the Second Circuit remanded the Welch matter to the Federal District Court. The remand will necessitate a hearing on the merits of among other things Respondents' allegations of active concealment of the underlying fraudulent activities alleged in the Complaint. Such a hearing will, of necessity, involve complex issues of fact which in and of themselves render Welch v. Cadre Capital an unsuitable case in which to grant a Writ of Certiorari. Respondent Welch purchased his two (2) limited partnership interests in the Keystone 84-1 Oil and Gas Drilling Program in May and July of 1984. Respondents Dr. Andrew Guest and Mrs. Elizabeth Guest purchased

their six (6) limited partnership interests in the Keystone 84-1 Oil and Gas Drilling Program on May 10, 1984. Welch purchased his limited partnership interests through Petitioners Roberts and Financial Center Securities. Respondents Guests purchased their limited partnership units through Petitioners Ednalou and Norman Ballard, brokers and principals of Financial Center Securities. Each limited partnership unit cost $20,000.00. Respondents paid $5,000.00 cash per unit and financed the $15,000.00 balance by executing promissory notes in favor of the managing general partner Cadre Capital. In July of 1984, Cadre Capital assigned the Respondents' promissory notes to Northwest Savings Bank in return for between 660 thousand and 1.3 million

dollars to finance the program. Respondents alleged Petitioners violated Securities Exchange Commission Rule 10b5 by failing to disclose an outstanding Securities and Exchange Commission injunction against John Meatte, the man responsible for actually drilling and exploring for oil and gas in the Keystone 84-1 Oil and Gas Program. Respondents alleged Petitioner Northwest Savings Bank aided and abetted the underlying fraud because it performed its own due diligence investigation into the Keystone Program, discovered among other things Mr. Meatte's history yet withheld this knowledge from investors and agreed to loan money to the Keystone Program thereby substantially assisting the primary violators in their fraudulent sale of the limited partnership

interests.

Respondents alleged in their Complaint that Petitioners had actively concealed the complained of fraudulent activity from Respondents by a misleading series of status reports concerning the operation of the Keystone 84-1 Oil and Gas Drilling Program. These reports consisted of letters which Respondents received on November 4, 1985 and May 14, 1986 falsely indicating that the Keystone Program was being properly operated and that further evaluations would be performed and that Respondents would be notified of the results. Respondents heard nothing further from Petitioners until, in the case of Dr. William Welch, January 1987 when he was informed the Keystone 84-1 Program was in financial difficulty. The Guests did not receive

actual notice of the Program's insolvency until March of 1987. Respondents Guests had been reassured by letter dated June 3, 1986 that the Keystone Program was still viable. Because Respondents brought their action within two (2) years of discovery of the fraudulent activity which had been actively concealed from them, their action was timely under traditional statute of limitations rules. It was this traditional approach that the Court, Nevas, J. rejected in favor of an absolute three (3) year statute of limitations. Respondents appealed that decision which gave rise to the Second Circuit's reversal of Judge Nevas in Dr. William Welch III et al v. Cadre Capital et al, 923 F. 2nd 989 (2nd Cir. 1991).

II. SUMMARY OF ARGUMENT

The petition for certiorari in Welch et al v. Cadre Capital et al should be denied because it does not raise issues of "peculiar gravity or general importance". The issues which the Petitioners raise deal with a private dispute between a small group of individuals, not with an issue which is important to the general public. Welch et al v. Cadre Capital et al does not involve determination of fundamental rights under the Bill of Rights nor does it involve a legal principle applicable to a substantial number of pending similar claims.

The petition should also be denied because the alleged lack of uniformity about which Petitioners complain is more illusory than real.

Respondents respectfully submit that

the Second Circuit Court of Appeals correctly decided Welch et al v. Cadre Capital et al. The new one (1) year/three (3) year statute of limitations announced in Ceres Partners v. GEL Associates, 918 F.2nd 349 (2nd Cir. 1990) establishes a new law which overturns clear past precedent. The new statute of limitations should not, therefore, be applied retroactively. Finally, Respondents submit that the Second Circuit Court of Appeals was correct because its decision preserves Respondents' right to a trial before a jury of their peers. The right to trial by jury is widely regarded as the pride of the English speaking world. Certiorari should have been granted if the Second Circuit's decision deprived Respondents of their right to a jury

determination. That is not the case here.

III. ARGUMENT

1. PETITIONS FOR CERTIORARI IN GENERAL

Jurisdiction of the Supreme Court to review judgments of the Courts of Appeals by certiorari is to be exercised entirely at the discretion of the Court which ordinarily will not grant the Writ except in cases of peculiar gravity or general importance or in order to secure uniformity of decision. Corpus Juris Secundum Federal Courts Section 204(2). Certiorari will be granted only in cases involving principles the settlement of which is important to the public as distinguished from the parties. 32 American Jurisprudence 2nd Fed Practice and Procedure Section 784; Rice v. Sioux

City Park Memorial Cemetery Inc., 349 US 70, 75 S.Ct 614, 99 L.Ed. 897 (1955).

2. PETITIONERS' WRIT OF CERTIORARI PRESENTS NO QUESTIONS OF GENERAL IMPORTANCE

A petition for certiorari will be denied where the case, however important to the parties, involved no question of public or general interest nor any conflict between the decisions of state and federal courts of different circuits. Hamilton Brown Shoe Company v. Wolf Brothers and Company, 240 US 251, 36 S.Ct. 269, 60 L.Ed. 629 (1915).

Two (2) common threads run through cases in which this court has chosen to grant the petition for the Writ of Certiorari. The case may involve the protections of a person's life, liberty and property to which protections the

person is entitled under the fourteenth amendment and the Bill of Rights. Alternatively, the case may involve the resolution of a fundamental principle of Federal law, such as the rights and liabilities of ocean carriers for lost or destroyed cargo under Admiralty law or the correct measure of damages in a trademark infringement case. Neither of these common threads appears in Welch et al v. Cadre Capital et al.

Issues involving the protections afforded under the Bill of Rights arise most starkly in petitions for a Writ of Certiorari in the context of criminal law and procedure. In Massachusetts v. Painten, 389 US 560, 88 S.Ct. 660, 19 L.Ed. 2nd 770 (1968), this Court was asked to determine whether a criminal suspect's rights to be free from unlawful

search and seizure under the fourth amendment had been violated. Although this Court ultimately dismissed the Writ of Certiorari as improvidently granted, it pointed out that the case raised important constitutional issues. The issue in Painten involved whether police who had obtained initial lawful entry to Plaintiff's dwelling could subsequently expand their activities to include a search and seizure. Although the police had indicated their motive for wishing to enter Defendant's dwelling was to question the Defendant, in reality, the Police wished to search and arrest the Defendant regardless of whether their investigation would provide probable cause to make the search constitutional. The Defendant, once police entered his dwelling, discarded incriminating

evidence through his apartment's window. Police seized the evidence, arrested the Defendant and the State obtained a conviction. Grounds for granting the petition of Certiorari were whether the First Circuit Court of Appeals erred in its view that the policemen's unlawful subjective intentions required exclusion of evidence obtained by initially lawful conduct. Welch does not involve an issue of "peculiar gravity" such as the right under the fourth and fourteenth amendments of citizens accused to be secure in their persons, property and papers from unreasonable search and seizures. The Court has also granted the Writ of Certiorari in a case involving the construction of the Federal Rules of Criminal Procedure including Federal Rule of Criminal Procedure 11. Where an

issue has arisen of importance concerning the administration of federal criminal law in Federal Courts and a conflict has arisen within the Circuits, a petition for a Writ of Certiorari will be granted. McCarthy v. US, 394 US 459, 89 S.CT 1146, 22 L.Ed. 2nd 418 (1969). In McCarthy supra, the Court was confronted with the important issue of the proper procedure to follow in determining the voluntariness of a guilty plea. Involved were the issues of a Defendant's awareness that the guilty plea would deprive him of his right to confront and cross-examine his accusers and his right to obtain a trial by a jury of his peers. The Court held that the trial judge's failure to personally canvas the Defendant about these issues was a violation of the Defendant's due process

rights. Welch, by contrast, does not involve the potential deprivation of a Defendant's fundamental constitutional rights under the fourth, fifth, sixth and fourteenth amendments.

Welch et al v. Cadre Capital et al does not involve issues requiring this court to construe important provisions of federal law. Welch is not a case involving construction of the Internal Revenue Code. c.f. Rudolph v. US, 370 US 269, 82 S.Ct. 1277, 8 L.Ed. 2nd 484 (1962). Although the Court ultimately dismissed the Writ in Rudolph as improvidently granted, the case initially involved construction of Internal Revenue Code Section 61. In particular, Rudolph raised the issue of the includability of certain employee benefits in gross income. No such issue of wide reaching

application appears in Welch. Nor does Welch involve determination of the proper measure of damages in a trademark infringement suit. Hamilton Brown Shoe Company v. Wolf Brothers and Company supra.

A petition for certiorari is granted when questions of gravity and importance are involved. This requirement is especially important because the Courts of Appeal were created for the purpose of relieving the Supreme Court of the oppressive burden of general litigation which prevented the Supreme Court's examination and disposition of cases of public concern and which delayed suitors in pursuit of justice. Ex parte: In the Matter of John Woods, 143 US 125 (1892). These matters include construction of acts of Congress in light of treaties

with foreign governments. The status of domicile in respect of natives of one country domiciled in another, a matter of international law, will be brought under consideration upon the record and (the Court) was of the opinion that the grounds for the application (for the Writ of Certiorari) called for intervention. Ex parte: In the Matter of John Woods supra. However, a controversy which primarily implicates questions of state law and presents no federal question will not support the grant of certiorari. Wolf v. Weinstein, 372 US 682, 83 S.Ct. 963, 10 L.Ed. 2nd 33 (1963). The construction of the laws of Minnesota concerning whether the dismissal of one suit by a Minnesota State Court barred a subsequent suit under Minnesota law was not of the gravity and general importance

to require the intervention of the Supreme Court. Whether the applicable use of Connecticut's Uniform Securities Act's two (2) year statute of limitations and the Doctrine of Equitable Tolling was correct under Connecticut law at the time Judge Nevas dismissed Respondents' SEC Rule 10b5 claims is not the type of issue consisting of sufficient importance to warrant Supreme Court review. It is an issue essentially of state law.

3. THE PETITION FOR CERTIORARI SHOULD BE DENIED BECAUSE THE ISSUES RAISED IN WELCH v. CADRE CAPITAL DO NOT INVOLVE A SUBSTANTIAL NUMBER OF LIKE CLAIMS

A petition for a Writ of Certiorari will be granted where a determination of the issue raised will guide adjustment of a large body of similar claims now pending. Alcoa Steamship Company v. US,

338 US 421, 70 S.Ct. 190, 94 L.Ed. 225 (1949). In Alcoa, the issue presented to the Court was government compensation of private ocean carriers for cargoes of U.S. Government munitions and supplies lost to enemy submarine action at the height of World War II. During the period of January through December 1942, these losses included 336 ships in the Caribbean theater alone for a total tonnage of 1,559,442 tons. S. Conn, R. Engleman & B. Fairchild, The United States Army in World War II, Guarding the United States & Its Outposts p. 431 (Office of the Chief of Military History Dept. of the Army 1964). Welch does not present such a large number of similar claims. The Court of Appeals for the Second Circuit was at pains to point out in its decision in Welch that "the

purposes of the 34 Act will not be impaired by a continuation of a handful of lawsuits filed within the longer time limits of previously applicable state law." See Petitioners' Appendix 15a. Welch also does not involve construction of a Federal Rule which is of vital importance to the administration of criminal law and which is responsible for the disposition of large numbers of federal criminal cases. As this Court pointed out in granting certiorari to review the proper procedures for taking guilty pleas under Federal Rule of Criminal Procedure 11 "during 1968 approximately 86% (22,055 out of 25,674) of all convictions obtained in the United States District Courts were pursuant to a plea of guilty or a substantial equivalent, a plea of nolo contendere.

McCarthy v. US supra n. 7 at 22 L.Ed. 2nd 424 citing 1968 Director of the Administrative Office of the United States Courts Annotated Report 261. Welch deals with a small group of three (3) private investors not tens of thousands of citizens whose due process rights are at stake.

4. THE ALLEGED CONFLICT BETWEEN THE SECOND AND THIRD CIRCUIT COURTS OF APPEAL IS ILLUSORY

The alleged conflict between decisions on the retroactivity of the one (1) year/three (3) year statute of limitations in Securities Exchange Commission Rule 10b5 actions between the Second and Third Circuit Courts of Appeals is more illusory than real. Established precedent in Connecticut supports Respondents' reliance on the two

(2) year statute of limitations and the Doctrine of Equitable Tolling. Clute v. Davenport Company, 584 F. Supp 1562 (D. Conn. 1984). This established precedent permitted the Second Circuit Court of Appeals to correctly interpret Ceres as constituting an exception to the retroactivity application of Chevron Oil Company v. Huson, 404 US 97, 92 S.Ct. 349, 30 L.Ed. 2nd 296 (1971). The Third Circuit Court of Appeals decision in Hill v. Equitable Trust Company, 851 F. 2nd 691 (3rd Cir. 1988), cert. denied, 488 US 1008, 109 S.Ct. 791, 102 L.Ed. 2nd 782 (1989) is not a conflict with Welch but rather reflects the Third Circuit's distinguishable application of the Chevron decision where no clear precedent as to the applicable statute of limitations existed within the

jurisdiction of the Third Circuit Court of Appeals. This alleged conflict does not supply the grounds for granting a certiorari petition in an already overcrowded docket. The Court must be consistent in not granting a Writ of Certiorari except in cases involving principles the settlement of which is of importance to the public as distinguished from that of the parties and in cases where there is a real and embarrassing conflict of opinion and authority between the Circuit Courts of Appeal. Layne and Bowler Corporation v. Western Well Works, 67 L.Ed. 712 (1922). Welch et al does not come under either heading.

5. CERTIORARI SHOULD BE DENIED BECAUSE WELCH et al v. CADRE CAPITAL et al IS NOT RIPE FOR REVIEW

Because the Court of Appeals remanded

the case, Welch is not yet ripe for review by the Supreme Court. Brotherhood of Locomotive Firemen and Engineers et al v. Bangor and Aroostock Railroad Company et al, 389 US 327, 88 S.Ct. 437, 19 L.Ed. 2nd 560 (1967). The Second Circuit did not simply reverse the District Court's holding but rather reversed and remanded the Welch case. Part of the issue in trial in Federal District Court will be when the Respondents actually had notice of the fraudulent activity which was allegedly concealed from them. Welch also raises the factual issue of when the Respondents actually discovered the fraudulent activity. A resolution of these issues by the trier of fact in a manner which indicates the Respondents either knew of or should have known of the fraudulent activity before they

actually commenced their law suit will eliminate the necessity of the Supreme Court's review of the retroactive application of the Ceres decision. Where the Court decides an issue of public importance, it does so in the context of meaningful litigation. Its function in resolving conflicts among the Courts of Appeals is judicial, not simply managerial or administrative. SS Monrosa v. Carbon Black Export, 359 US 180, 79 S.Ct. 710, 3 L.Ed. 2nd 723 (1959).

The Second Circuit correctly decided the Welch v. Cadre Capital matter. In considering a petition for certiorari, the Supreme Court will be vigilant to make certain that the intent of the law is carried out. Cognizant of the duty to effectuate the intention of Congress to secure the right to jury determination,

the Supreme Court is vigilant to exercise the power of review in any case where it appears that litigants have been improperly deprived of that determination. The Court is under an obligation to effectuate present Congressional intention by granting certiorari to correct instances of improper administration of Congressional acts and to prevent their erosion by narrow and niggardly construction. The Second Circuit has given Respondents the right to a jury trial; a grant of certiorari is not required. Rogers v. Missouri Pacific Railroad Company, 352 US 500, 77 S.Ct. 443, 1 L.Ed. 2nd 493 (1957).

IV. SUMMARY

Respondents respectfully point out that Welch does not raise issues of peculiar

gravity or public importance. The number of claims for which the United States Court of Appeals for the Second Circuit's decision in Welch constitutes a precident are, by that court's own estimation, limited to a "handful". Welch essentially represents a dispute among a small group of private individuals and does not warrant the intervention of the United States Supreme Court. The protections afforded by the fourteenth amendment and the Bill of Rights are not at stake in the Welch matter nor does Welch raise fundamental issues of construction of federal laws. For these reasons, the Respondents respectfully request that the Court deny the Petitioners' Writ of Certiorari.

Respectfully submitted,

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